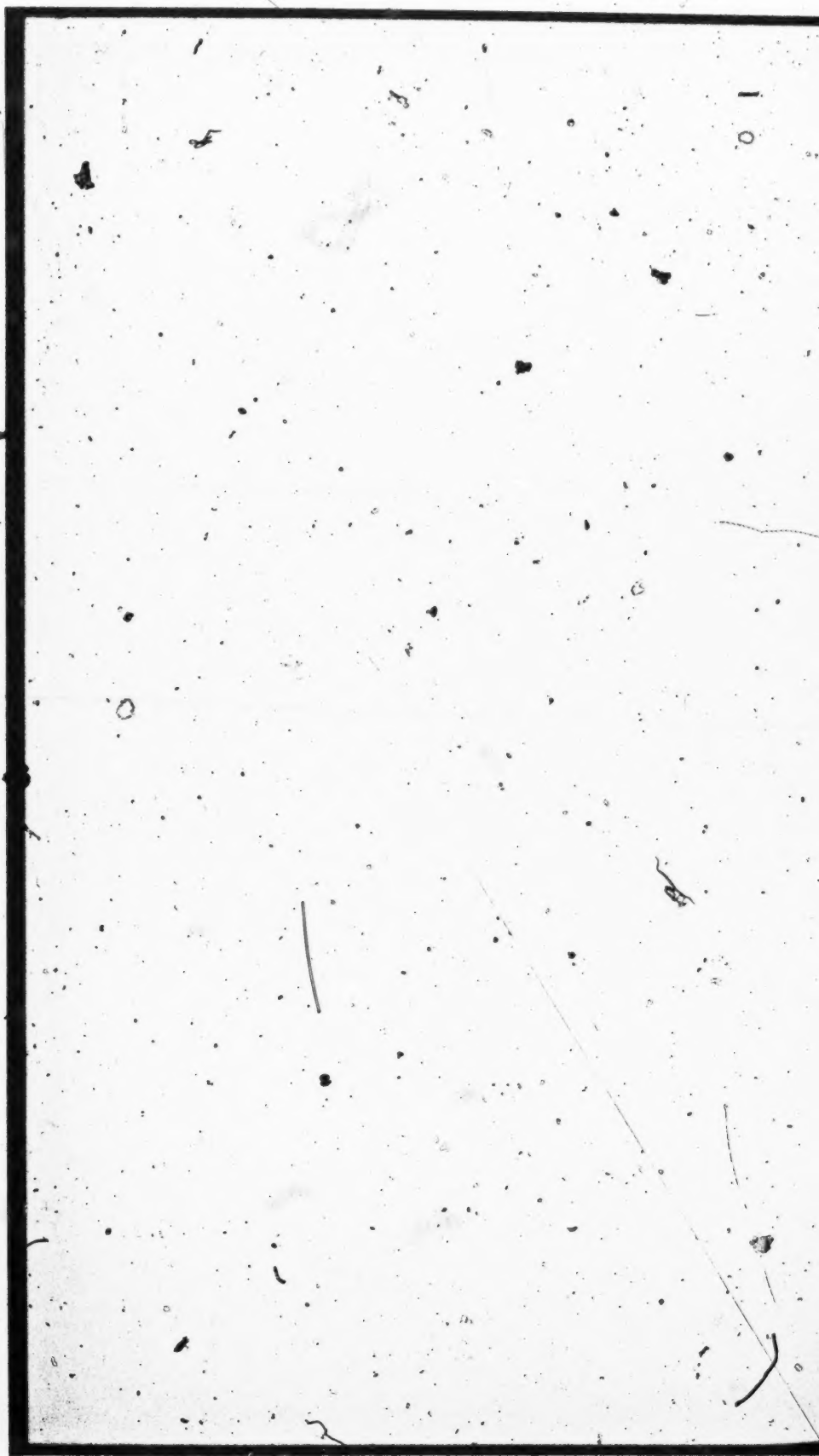

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 66

RAY LYMAN WILBUR, AS SECRETARY OF THE INTERIOR,

Petitioner.

v.

THE UNITED STATES OF AMERICA, EX REL., THE VINDICATOR CONSOLIDATED GOLD MINING COMPANY,

Respondent

BRIEF FOR RESPONDENT

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v.

THE UNITED STATES OF AMERICA, EX REL., THE VINDICATOR CONSOLIDATED GOLD MINING COMPANY,

Respondent

BRIEF FOR RESPONDENT

JURISDICTION

Construing the Act of February 13, 1929, under authority of which this suit was filed, according to its terms as giving jurisdiction to decide the statutory questions here involved and to enforce such decision by requiring the Secretary of the Interior to comply therewith, this Court has jurisdiction of this writ.

If it were true, as argued by Petitioner, that such Act merely authorizes the courts of the District of Columbia to express a legal opinion, leaving the Secretary discretion in the application thereof, this Court would lack jurisdiction of this proceeding.

Federal Radio Commissioner v. General Electric Company, 281 *U. S.* 464, 469;

Massachusetts v. Mellon, 262 *U. S.* 447;

Texas v. Interstate Commerce Commission, 258 *U. S.* 158, 162;

Ex Parte Bakelite Corporation, 279 *U. S.* 438, *at* 454, *note* 14.

APPENDIX

The detailed legislative history in both houses of Congress is long and complex. We have printed as an Appendix to this Brief a review of such of this legislative history as relates to the issue here, although we consider the meaning of the words used in the Act itself so plain that no reference thereto should be made. If it is referred to at all, it must be followed from beginning to end in order that a mere chance opinion stated in an informal debate and subsequently changed should not be taken from its context and given a distorted meaning.

THE ISSUE

The writ of certiorari herein was granted upon the petition of the Secretary of the Interior and the sole issue is one of statutory construction. A demurrer, filed in the trial court by Respondent, to the petition of Petitioner, defendant in the trial court, raises the question.

The War Minerals Relief Act of March 4, 1925, authorizes the Secretary of the Interior to reimburse "such net losses as have been suffered * * * by reason of producing or preparing to produce" certain war minerals. The question is whether this phrase includes net losses resulting from the purchase of real property. The Respondent contends that it does include such losses, and the decision of the Court of Appeals of the District of Columbia sustained that contention. See *United States ex rel. Vindicator Consolidated Gold Mining Company v. Wilbur*, 63 App. D. C. 69, 47 F. (2d) 422 and record 22.

Summary of Argument.

1. As a matter of law money expended for the purchase of real estate in accordance with the Act of March 2, 1919, and lost is a "net loss," "suffered" and it is the duty of Petitioner "to adjust, liquidate and pay such net losses."

2. The Act of 1919 is free from ambiguity and legislative history thereof is not material; but, if such history be examined it supports the construction stated above.

3. Under the Act of February 13, 1925, courts are empowered to decide all "questions of law" here involved, to certify to the Petitioner their judgments and decrees construing such legal questions and Petitioner then "shall proceed with the final adjustment of" (the claim of Respondent) "in accordance with the law as construed."

CHRONOLOGICAL STATEMENT OF THE CASE

A. The Applicable Statutes

After the United States on the 6th day of April, 1917, became a party to the great war, there was urgent need for many minerals some of which were not ordinarily produced in the United States in sufficient quantities to meet such need. Therefore, the Congress deemed it wise to enact legislation that would stimulate the production of such minerals. Among these minerals was chrome.

In pursuance of this purpose, the Congress, by Act approved October 5, 1918, provided a means for encouraging the production, conserving the supply, and controlling the distribution of certain minerals, including chrome. This Act, the material parts of which are copied in an Appendix filed herewith (pp. 2 ff.), recites this purpose, authorizes the President to purchase or take over the means of meeting the needs of the Government, and provides that just compensation,* determined by the President, shall be paid. An appropriation of $50,000,000 was made.

The [illegible] effective date of this Act was to note the Armistice and came at a time when the Executive Department probably knew that the Armistice was near, it was never resorted to; but during the pendency in the Congress of that Act and prior to its passage and approval the President and the several

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* The ascertainment of which is a judicial question. *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420, 571; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327.

departments of the Government were doing all they could to stimulate production, urging and inducing that those who would and could make every possible effort to increase the production of these ores.

Many patriotic citizens, including the Respondent here, yielded to the demands of the Government, invested money, made expenditures and increased production beyond the needs in the United States after the termination of the war. To meet the obligation of the Government resulting from these efforts of the Executive Department, and as supplementing the Act of October 5, 1918, the Congress passed the Act of March 2, 1919. This Act was amended November 23, 1921, and February 12, 1929. These several Acts are printed in our Appendix filed herewith (pp. 23, 27, 31, 39).

Summary of Applicable Statutes

The principal substantive clause of the Act of 1919 directs the Secretary of the Interior to adjust, liquidate, and pay * * * net losses * * * sustained by any person, firm, or corporation by reason of producing or preparing to produce * * * copper, but such "losses" must have resulted from expenditures money "in good faith" and when so expended the claimants "shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to * * *," and the Secretary "*shall* make such adjustments and payments * * * as he shall determine to be just and equitable."

A review of the Secretary's final decision is provided (Act February 12, 1929, Appendix 40) "upon

any question of law," but on "all questions of fact" his decision "shall be conclusive and not subject to review by any court."

Payments, as said in the original Act, shall be made "from the funds appropriated by said Act of October fifth," 1918 and said funds "shall continue to be available for said purpose"; (a limit of $8,500,000 was originally fixed but later by Act of June 7, 1924, Appendix 31, the original appropriation of $50,000,000 was restored).

No claims, it was stated in another proviso to the original Act, could be "allowed or paid * * * unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred * * * were made in good faith for or upon property containing * * * chrome." "And no profits of any kind * * * and no investment for merely speculative purposes shall be recognized * * *."

Applying the Act of 1919 and these amendments to the particular facts in this case, these may be reduced to this statement:

If one who in good faith expends money or incurs obligations in producing or preparing to produce chrome, thereby suffers losses, his net losses shall be adjusted and paid, but profits and speculative investments are denied consideration in determining such losses.

Respondent Complied With the Terms of the Statute

Respondent filed its claim with the Secretary of the Interior showing that it complied with the Act

in every respect and was given an award; but the moneys lost by Respondent as the result of having purchased property that came within the description of the Act were deducted from the award and no allowance therefor made. The Secretary exercised his discretion as to the facts and determined "a loss on (R. 5) property $16,259 (R. 6)," but erroneously deciding the question of law, has said "this amount has been disallowed." (See statement near bottom page, R.6.) The question of law here, therefor, is: Should "this amount have been disallowed"?

About the time of that ruling one Logan Rives (who had suffered net losses by reason of the purchase of property) having been denied allowance therefor, filed his suit by mandamus in the Supreme Court of the District of Columbia. That Court ordered the issuance of the writ and an appeal was taken to the Court of Appeals. On January 7, 1924, the Court of Appeals affirmed the Supreme Court of the District and held that losses resulting from the purchase of property were properly allowable. *Work v. United States ex rel. Rives*, 54 *App. D. C.* 84, 295 *Fed.* 225. Shortly thereafter, and on the 13th of February, 1924 (Calendar No. 306, 68th Congress, First Session, report No. 292, dated March 18, 1924), the Secretary of the Interior wrote to committees of the Congress calling attention to the fact that if the decision of the Supreme Court of the District and of the Court of Appeals in the Rives case and in a case involving interest paid on borrowed moneys stood, that the appropriation was inadequate (Appendix 29).

The committee of the Congress having received the letter of the Secretary dated, as aforesaid, February

18, 1924, acted thereon, in the report referred to above, dated March 18, 1924, and called attention to the fact that the $8,500,000 to which amount the original appropriation had been reduced, was inadequate and a new law was recommended. By Act approved June 7, 1924 (Appendix 31), the Congress struck the limitation, leaving in force the original appropriation of $50,000,000.

The Rives case having reached this Court, *Work v. Rives*, 267 *U. S.* 175, it was held that the Secretary of the Interior had an uncontrolled discretion and that courts had no jurisdiction in the absence of an abuse of that discretion to reverse the Secretary either on questions of law or on questions of fact. The Court of Appeals and the Supreme Court of the District were, therefore, reversed and the cause dismissed.

The matter was again taken up in Congress and the Act of February 18, 1929, was passed. This Act (Appendix 39), gives courts jurisdiction in this and like cases "to review the final decision of the Secretary of the Interior upon any question of law," requiring the Secretary to obey such decision and leaves the Secretary a discretion "on all questions of fact."

B. This Proceeding

After the passage of the Act of February 18, 1929, and as authorized by that Act, Respondent filed its petition for review and mandamus in the Supreme Court of the District. A response, later an answer, was filed by the Secretary with exhibits attached thereto showing the facts, and the cause was deter-

mined by the Court by demurrer to plea and answer. The District Supreme Court held that the Secretary of the Interior had correctly decided the law. An appeal was taken to the Court of Appeals of the District where the trial court was reversed in an opinion by Mr. Justice Wheat (R. 22) and thereafter, on petition of the Secretary, this writ of certiorari was granted.

C. Legislative History

The Acts of 1919 and of 1929 should properly be considered in connection with the Acts of 1918, 1921, and 1924, all copied in the Appendix and referred to above, but mere legislative discussion has no place here.*

Petitioner, however, in his petition for certiorari and to a lesser extent here, makes reference to certain statements made in the Congress; and, that this Court may have full and accurate information with reference thereto, we have printed and file herewith an Appendix a reading of which will give such information.

Petitioner in his petition quoted certain language used by Senator Smoot in an informal discussion in the Senate and in his brief gives a few sentences from a statement made by Congressman Robsion (see his brief herein, pp. 11, 12) in reporting the Act of February 18, 1929.

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* *United States v. Missouri Pacific R. Co.*, 278 U. S. 269; see also *Railroad Com. v. C. B. & Q. R. Co.*, 257 U. S. 563, 588; *Hamilton v. Rathbone*, 175 U. S. 414, 419; *United States v. Hartwell*, 6 Wall. 385.

This error based on a misunderstood casual statement of Senator Smoot had its beginning as early as 1919 (Hearings of Committee on Mines and Mining, H. J. Res. 170, pp. 150 ff.) and has not yet been overtaken by the truth. In a claim heard May 26, 1919, a Commission in the Department of the Interior quoted the statement of the distinguished Senator (id. 151) and concluded therefrom "that it was the intention of Congress not to allow for the purchase price of property" (id. 152), although in the same case office expenses in New York were allowed.

In our Appendix filed herewith we have shown that not only did Senator Smoot change his views but later acquiesced in a bill containing the language to which he objected and that the bill which finally passed as the Act of March 2, 1919, contained language more comprehensive than that to which Senator Smoot addressed his quoted remarks. This Appendix also shows (pp. 47 ff.) that the Committee considering the Act of February 13, 1929, and the representatives of the Department of the Interior definitely knew and certainly intended that the Act should give courts the specific power and authority again to decide that as a question of law the Secretary should pay losses for the purchase of property and that all discretion to disobey the law thus to be decided by the courts was taken away from him, the courts being given definite authority to certify to the Secretary their decisions as to the question of law.

We further showed in the Appendix that the Committee of the House (pp. 26, 27) found that no clarifying legislation was needed but that—

"The language of the act as above quoted is clear, and if interpreted as the courts of the country have repeatedly held such statutes should be interpreted, the committee is of the opinion that the purpose of Congress can be fully carried out and a 'just and equitable' settlement can be had of every legitimate claim. * * * For the reasons above stated the committee has not thought it necessary to amend the original act." (Appendix 27.)

ARGUMENT

The issue stated above, page 2, should, it is respectfully submitted, be determined by deciding that "net losses" incurred from the purchase of property should be paid and the Court of Appeals of the District of Columbia affirmed.

No Ambiguity in the Statute

The statute is a simple one, not difficult to understand, and the only ambiguity that has arisen as to its meaning results from an extraneous circumstance not fully understood by the Secretary or the Attorney General each of whom used it as a basis for an opinion. Disregarding, as we think should be done, this extraneous circumstance, let us look to the statute.

The statute requires the Secretary of the Interior to adjust, liquidate, and pay net losses. In this case the Secretary found a net loss but refused to liquidate and pay the same because he said as a matter of law that losses resulting from the purchase of property were not proper items for liquidation and payment. The statute is mandatory in form. The first

paragraph refers to the Secretary's duty to "adjust, liquidate and pay." Later the Secretary is commanded to make adjustments and payments as he shall determine to be just and equitable. These words demand a liberal construction.

The Statute Should Be Construed to Effect Its Purpose

The law under which Respondent claims as said by this Court in construing another statute having a similar purpose

> "is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment."

Stewart v. Kahn, 78 U. S. 11 *Wall.* 493, 504.

"Just" as was said by Mr. Justice Brewer, in *Monongahela Navigation Company v. United States*, 148 U. S. 312, 326, is an "emphatic" term, when used as in the controlling statute here, and means that the compensation

> "must be a full and perfect equivalent for the property taken."

Again, in the same case (p. 325), the learned justice said:

> "And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon an individual more than his just share of the burdens of the government, and says that when he surrenders to the public something more and different from that which is exacted from other

members of the public, a full and just equivalent shall be returnable to him."

Construed as this Court says the statute shall be construed, the main substantive clause of the statute definitely authorizes the payment of net losses suffered by reason of producing or *preparing to produce* chrome. The claim of Respondent falls within this authorization.

Provisos of the Statute Support Respondent's Contentions

There are several provisos in the statute, only three of which deal with the substance of the relief as distinguished from administrative detail. These three may be regarded as exceptions to the general command and are:

(1) "No claim shall be allowed * * * unless it shall appear to the satisfaction of the Secretary that the expenditures so made * * * were made in good faith for or upon property which contained * * * chrome."

The good faith of Respondent and that the property contained chrome were found and the fact that an expenditure was made "for" property was also found. So the Secretary was satisfied of each of the requirements of the quotation above.

(2) No profits of any kind shall be included.

Here no profits are claimed nor were any found to exist.

(3) No speculative "investments shall be recognized."

This negative statement implies a positive command to recognize all investments not speculative. Here there was no claim that there was any speculative investment. The investment was found to have been made for the purpose of producing and preparing to produce chrome.

Buying Lands Containing Minerals Is Preparing to Produce

The main substantive clause of the statute thus states the broad intention of Congress to pay *all* net losses incurred in furnishing war materials at the request of the Government; to indemnify claimants both as to original cost, i. e., "preparing to produce," and the operating cost and all correlative expenses, i. e. "producing." The wording is clear and unambiguous, calls for no construction, and needs only application. What more essential step could there be in preparing to produce than the acquisition of the land in which nature had deposited the raw material? What suggests excluding from relief those who took the necessary preparatory step to obtain the right to produce by the purchase of the deposit? This situation is clearly one Congress proposed to relieve and the language of the statute dissociated from extraneous circumstances, is so plain that it would seem that further discussion would be unnecessary.

"For" Means in Consideration of a Purchase

The language of the first proviso discussed above strengthens this meaning. The word "for" occurring in the phrase "for or upon property" is contained in an exception and as neither Respondent nor its claim

is within that exception and as Respondent's cause is clearly included in the positive right to net losses, perhaps a discussion of the meaning of this word is unnecessary. However, while it has different meanings in various settings, the lexicographers all agree that one—and probably its principal—meaning is *compensation made or offered in exchange for something*. Illustrations are used, such as that in the Standard Dictionary, which is:

"I gave a dollar *for* it." *

Not only does this proviso serve its ordinary function, it emphasizes the affirmative scope of the enacting clause. It states "expenditures * * * made * * * FOR *or upon* property." It was obviously the intention of Congress to make claimants *whole*, both as to the original purchase price and as to subsequent development and operation. The claimant herein made expenditures "for" real property. It also suffered deficits in the operations "upon" its property. Its losses in *both* respects come within the statute.

This, it is submitted, is the natural and plain meaning of the proviso in the setting in which it is used. There is no ambiguity and no occasion for construction.

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* Text book writers use similar illustrations. In 27 C. J. p. 791 "for" is defined as meaning "in consideration of." Other definitions are discussed in *Work v. United States Ex Rel. Rives*, 54 *App. D. C.* 84, 295 *Fed.* 225, *at* 227; *Gardner v. Corson*, 15 *Mass.* 500, 503; *Norton v. Woodruff*, 2 *N. Y.* (2 *Comst.*) 153, 156.

"For" and "Upon" Each Has a Meaning

Even if we "conjure up conditions to raise doubts" and attempt a word by word dissection of the meaning of the phrase "for or upon property," our conclusion is strengthened. It is presumed that by the use of *two* prepositions instead of one Congress intended that each should add something to the meaning of the phrase. The word "for" must have one meaning, and the word "upon" must have another. If we adopt the contention, however, that by using "for" Congress meant only "for the benefit of" and intended thereby to include only expenditures off the property, such as tram lines, power lines, roads, loading platforms, etc., we find that Congress used two words where one would suffice; for the preposition "upon" has been judicially held to cover such expenditures. It has long been the rule, established in many mining cases, that labor and improvements are deemed to have been *on or upon* a mining claim where made for its development, that is, to facilitate the extraction of the metals, although such labor and improvements may in fact have been at a distance from the claim.

In *St. Louis Smelting Company v. Kemp*, 104 *U. S.* 636, 655, (1882), this Court considered Sec. 2324, R. S. 17 Stat. 91 which provides that there shall be annually expended, in labor and improvements *on* the claim, $100.00. In discussing whether the labor and improvements within the meaning of the statute should be deemed to be *on* the mining claim, although performed at a distance from the claim itself, the Court, p. 655, said:

> "Labor and improvements within the meaning of the statute, are deemed to have been had

on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for the development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material."

To the same effect are the cases of *Chambers v. Harrington*, 111 *U. S.* 350, 353, (1884); *Copper Glance Lode*, 29 *L. D.* 542 (1900), and cases cited.

Expenditures off the property but for its benefit are covered by the word "upon" in this proviso. Therefore, unless the word "for" is given its usual meaning in this context, that of "in consideration of," there will be a failure to ascribe a different meaning to each of the words advisedly used by the Congress.

"Invest" Connotes Purchase of Permanent Property Such as Land

The significant word used in another of the provisos which we have designated (3) above is the word "invest." This proviso is used for the purpose of preventing speculative investments, and, we repeat, is an affirmative statement that losses from investments other than speculative shall be paid. The definition of the word "invest" is well known and, as said by this Court, "implies a laying out of money or

money's worth." *LaBelle Iron Works v. United States*, 256 *U. S.* 337, 388.

An "investment" connotes the purchase of property, and is particularly applied to the purchase of real estate, as distinguished from the purchase of quickly worn out machinery and equipment for the operation of a mine. Money might be "expended" for such personal property but seldom (and then improperly) would it be referred to as an "investment." We commonly think of an investment as being an outlay for something lasting and permanent. Real property was just as essential to the preparation for and production of minerals as was personal property.

Loss of the Value of Land a Certain Loss

If it were true that losses sustained in the purchase of real property are difficult to compute and thus, possibly, uncertain, it would be irrelevant to this inquiry. Mere uncertainty does not make a purchase "speculative." Congress excluded investments for speculative purposes; but not losses "uncertain in respect of their amount." * The computation of such losses, in such manner "as he shall determine to be just and equitable," has been left to the Secretary.

As a matter of fact, there is no difficulty in determining the loss from an investment in real estate or

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* *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 *U. S.* 555, where this Court said: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. *Taylor v. Bradley*, 4 *Abb. App. Dec.* 363, 366, 367, 100 *Am. Dec.* 415."

mining property. Loss from decline in value through obsolescence or falling off of demand is recognized in other branches of the law, even though title is retained.* The present value, if any, of the property may be determined and the "loss" established with reasonable certainty, which is all that can be required. Here the Secretary computed "a loss" (R. 5) which he fixed at $16,295.00 (R. 6) and which he deducted from the total losses (R. 12).

REPLY TO PETITIONER'S BRIEF

It is believed that the foregoing statement of the case and of the law entitles Respondent to an affirmance of the judgment of the Court of Appeals. Notwithstanding, we shall briefly discuss the position of Petitioner.

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* Such are the rulings of the Commissioner of Internal Revenue and of the courts which have reviewed his decisions. A sale of assets is an easy method of determining loss, but such sale is not an absolute prerequisite.

In *Milton H. Bickley*, 1 B. T. A. 544, 547, the Court said: "As the corporation has no funds or assets of any kind and entirely ceased to do business in 1919, and as the stock had no value and could not be disposed of at any price, it was entirely worthless at that time. We are of opinion that the deduction of the amount of the two notes as worthless debts, and of the loss in the stock should be allowed in the year 1918."

Treasury Regulations recognize an exception to the rule requiring a sale or other disposition of property in order to establish a loss. See Treasury Regulations 45, Articles 143 and 154. These are stated and discussed in an annotation, 11 A. L. R. pp. 507 and 508.

Petitioner's Admissions of Record Not Consistent With His Argument Here

In the petition for a writ of certiorari (R. 5, 6) there are five specifications of error. The first three of these are based upon the claim that Respondent retained title to the property purchased. So far as this record shows this claim was never made by the Secretary prior to the answer filed in this cause. (R. 16 ff.)

In the response of the Secretary of the Interior filed March 15, 1929 (R. 4), he states that this cause presents

> "the sole and only question * * * whether or not one who was engaged in producing or preparing to produce chrome and sustained a net loss by reason of expenditures *for* the purchase of property * * * is entitled to have such loss reimbursed."

He further says:

> "* * * this court is vested with jurisdiction to review such questions of law as may have been decided in the disposition of petitioner's said claim by the Secretary of the Interior, and respondent makes no objection to, but on the other hand invites, a review of such questions." (R. 4.)

In this response the Petitioner herein, the Honorable the Secretary of the Interior correctly stated the issue and it will be noted that he uses the word "for" in describing the purchase of property. This position of the Secretary was fully sustained by the action of his office and of his predecessors.

On April 14, 1922, reviewing this claim, the commissioner in charge, stating the issue, said:

> "* * * there was but one question to be decided in this review, namely, whether the deduction which the former commission made *for the purchase of property was proper*—"

And in concluding his review:

> "I have no doubt whatsoever that the former commission was right in holding this to be purchase of property and not an allowable item." (R. 10.)

On May 15, 1922, the acting Secretary, rendering an opinion on appeal by Respondent here, said:

> "The payments made *upon* the lease and purchase price of the mine by Mr. Wood and his successor in interest are shown to be as follows";

then the conclusion is made—

> "Total payment on purchase price of mine, $16,259." (R. 11.)

In September, 1922, the First Assistant Secretary on reconsideration said:

> "It is clear beyond question that the expenditure aforesaid represents the purchase price of the mine." (R. 12.)

From the foregoing it is definitely shown that the question of retention of title was not considered by the Secretary. However, when Petitioner filed an answer to the petition, we find for the first time the claim made that retention of title was a relevant fact. This substituted answer says:

> "It is admitted herein that money was paid by relator in the purchase of property and if the

court holds that losses were sustained thereby and are allowable in cases where claimant retains title, the amount thereof will be subsequently determined by the Secretary of the Interior." (R. 18.)

It is not contended that the Honorable Secretary, Petitioner here, did not have the right to file a new answer in conflict with his first response, but what we do contend and what the record definitely shows is that the answer by using the same exhibits as were used to the response shows that the first answer speaks the truth. Petitioner having made the exhibits part of his answer, the exhibits control when in conflict therewith.

The learned counsel for Petitioner in the brief in support of the petition for certiorari (page 11) stated that the questions presented are limited to two, and these two are similar to numbers 4 and 5 (petition page 6) of the Specification of Errors.

A similar fact to that now sought to be injected as an issue in this case appeared in *Work v. United States ex. rel. Rives*, 267 *U. S.* 175, where, at page 176, it appears that Rives had not sold his property but "the land had lost most of its value because of the armistice." This, however, did not impress this Court as governing the decision in any way.*

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* As indicating that this claim that retention of title has something to do with the issue here made is an afterthought, it is interesting to look to the brief in the Rives case, above (See for right to refer to former case, *United States v. Canneries*, 279 *U S.* 553, 555). That brief was filed by the Honorable James M. Beck, Solicitor General, and the Honorable C. Edward Wright, attorney for the

Retention of Title Not An Issue

Although Petitioner on brief discusses this issue, there is no factual basis therefor. We may properly be permitted to repeat some brief portion of the record which Petitioner seems to have overlooked on brief. Petitioner in his response says:

Department of the Interior. It is of record in this Court and from that the following appears:

Page 5: "For the ruling had been, for reasons hereinafter discussed, that money spent in acquiring or purchasing real property or mining rights was not properly reimbursable under the relief act."

Page 7: "The Secretary did not dismiss so much of Rives' claim as involved the purchase price of real property on jurisdictional or any other ground. On the contrary, he took jurisdiction. He considered the item. He ruled against its allowance."

Page 10: "Congress did not intend to repay losses incurred in the purchase of real property and the plaintiff in error properly so construed the act."

In that brief it was claimed that inasmuch as the loss was admitted the case was in effect "a suit against the United States" and at page 18 this is said: "The Secretary's decision shows that we are advised of the amount of Rives' loss in his real estate transaction—$9,600. That has not been disputed by the plaintiff in error at any time."

At page 21 the brief, speaking of the Act of 1919, says: "It provided an appropriation of $8,500,000 to pay claims aggregating $18,131,493.30 (Senate Doc. No. 385, 66th Cong., 3d sess.). In no event were settlements and payments of these claims to exceed in the aggregate the amount appropriated."

And at page 22: "Rives is but one of several whose claims involve money paid for real property. Over $3,000,000 are involved. To include all such claims would require the expenditure of more than the $8,500,000 appropriated."

See above p. 10 when in 1919 purchase of property was denied with no reference to whether title was or was not retained.

"* * * the sole and only question finally determined by the Secretary of the Interior * * *" (R. 4)

is—

"* * * whether or not one who was engaged in producing or preparing to produce chrome and sustained a net loss by reason of expenditures for the purchase of property, to-wit, the property upon which the mine was located, is entitled to have such loss reimbursed under the provisions of said act." (R. 4.)

The agents of the Petitioner found "a loss on each property" (R. 5) and among the properties so included was "Property, $16,259" (R. 6). Of these losses so found to have been suffered the Petitioner through the same agents "disallowed property $16,259.00" (R. 6), and gave as an explanation therefor the statement of Senator Smoot (R. 7). This statement as has already been shown, was not a reason but the pertinent fact here is that "retention of title" had nothing to do with inducing the Petitioner to refuse Respondent pay for his found "loss on * * * property." The same "deduction" of this "loss" is shown record 8, and "purchase of property" was again held "not an allowable item" (R. 10), and the "Acting Secretary" who signs this brief in this Court held that expenditures for purchase of property "are not reimbursible under the law" (R. 12). The first time that the record in this case shows a claim that retention of title was relied on appears in the answer herein filed September 24, 1929 (R. 17), and such claim then and now made is in conflict with the facts shown of record and undisputed (R. 5, 6).

The record as quoted above shows a loss "on each property" and on one "property" the amount is stated to be $16,259. Notwithstanding this record, Petitioner in his brief (p. 20) says:

> "* * * it does not appear that any proof was offered by the respondent to show that it had *sustained any* loss."

It is hardly necessary to say that an error in a brief cannot change a fact in the record.

Whether or Not Discretion Is Left to Petitioner In Applying the Law Does Not Arise Here

It seems clear that the Petitioner must obey the law when courts announce what is the law and "certify" their "final judgment or decree" because the statute specifically commands that he "shall proceed with the final adjustment of said claim in accordance with the law as construed by the Court * * *" (Act 1929, Sec. 4, Appendix 40).

Respondent (R. 3) prayed for no more and the judgment of the Court of Appeals grants no more than this statutory right, and this right in no wise hampers the right of the Secretary to determine issues of fact.

While we have deemed it proper to discuss the action of the Petitioner in this case and the action of the predecessors of Petitioner in other cases, we do not believe that the issue discussed on Petitioner's brief wherein Petitioner claims (his brief p. 21) that the Court of Appeals has directed him "to find the facts and to make an allowance in accordance with that finding" arises in this case. As we construe the

opinion of the Court of Appeals and what we sought in our petition in the Supreme Court of the District is a finding of law that moneys lost in the purchase of property should and must be allowed. The specific amount of the loss, of course, is left for the Secretary and there is no contention that the Secretary's discretion as to facts should be in any wise limited. The Secretary himself seems to agree with us because in his answer hereto (R. 18) he says that the amount of our claim "will be subsequently determined." We believe that he has already determined it and we do not anticipate that he will make, although authorized so to do, a different determination than that he and his predecessors have heretofore made. He has determined the amount of the loss. He might review that determination, but we do not believe that he will do so in view of the frequent redetermination of that amount. However, we do not see that this question arises here. All the Court can do is to decide what the law is, to certify that decision to the Secretary, and when that certificate is made the Secretary must proceed in accordance with the law as announced by the Court.

The Only Issue Arising on the Record

From the foregoing it follows that this Court is called upon to decide the simple question of law, that is, briefly summarized, Whether or not losses growing out of the purchase of property shall be adjusted and paid. A decision from this Court on this question would leave to the Secretary discretion as to the facts but would leave him no discretion to decide whether or not he would comply with the law as announced by the Court.

The Meaning of the Act of February 13, 1929

The claim of the Secretary that the Act of February 13, 1929, if sound would leave him with the same discretion as theretofore, and such claim rests on the untenable ground that the Congress passed a meaningless statute. The former decision of this Court in the Rives case shows the necessity for the Act and the Act shows a purpose definitely to commit to a judicial determination the meaning of the statute approved March 2, 1919. The Act of October 5, 1918, provided for "just compensation," that of March 2, 1919, in order to award just compensation directed the payment of all net losses suffered. Reports of Congressional Committees and the Acts of November 23, 1921, and of June 7, 1924, show that the Congress sought to see that such losses were paid and the Act of February 13, 1929, definitely recommitted, with the consent and approval of Petitioner, *the issue of law* to the courts that had theretofore held the losses here suffered should be paid.

As the Petitioner discusses *Work v. Rives, supra,* we shall make brief reference to the opinion of this Court therein. This Court, page 181 of the opinion, refers to legislative history. We have hereinbefore and more fully in the Appendix hereto, given this legislative history and shown that the facts with refence thereto were inadequately presented to this Court. It should also be remembered that the decision in the Rives case, although this Court in an obiter dicta referred to legislative history, was based upon the lack of jurisdiction because the finding both of law and facts by the Secretary of the Interior, as the law then stood, was "conclusive and final." This

Court then referred to *United States v. Realty Company*, 163 *U. S.* 427, 439, and *Allen v. Smith*, 173 *U. S.* 389, 402, and Petitioner relies on the same cases here. The Act of October 5, 1918 (Appendix 2) gave a right to just compensation and the Act of March 2, 1919, being supplementary thereto merely added a new remedy. In the second of the cases cited above, it was held that the law there, and that is true here, was passed in recognition of a moral obligation and was not a *gift* by the Government.

What this Court said in the Rives case about discretion, final authority in the Secretary and that appeals to the Court were not allowed, referred to the conditions then existing. These conditions were changed by the Act of February 13, 1929, specifically to meet the decision in that case.

In the Rives case this Court quoted *Work v. United States, ex rel. Mosier*, 261 *U. S.* 352, 389, and called attention to the fact that the Secretary in that case "was not given discretion finally to construe" the statute. The Secretary here now by the Act of 1929 has no final discretion *to construe a law*. He may yet under the law and without any conflict with the decision of the Court below decide all issues of fact.

It is not contended, we reiterate, that the Secretary has been deprived of discretion *as to the facts*. That discretion is specifically retained.

The money was paid, says the Secretary, in the purchase of property, and, as shown above, he and all his subordinates, found that the cost of this property was lost. It is entirely immaterial whether or not the formal legal title is in Respondent or whether

that title has been disposed of. The fact that a thing is so worthless that it cannot be sold does not give it any value for any purpose.

Petitioner (Brief 12) claims that the Act of 1929 was not designed to change the construction placed upon the Act of 1919 and seeks to support this contention by a statement from Mr. Robsion. If this be true, why did Congress pass the Act of 1929? Mr. Robsion is entirely correct that the Act did not take away from the Secretary the *administration of the Act of* 1919. It did, however, take away from the Secretary his former right and discretion finally to determine *legal questions*. That is all the Act of 1929 does and that is all it needs to do in order to protect the rights of Respondent here.

Petitioner argues that the Congress had it intended to pay net losses for the purchase or lease of property would have said so in definite language. Had such an Act been passed it would have been unusual, and unjust. Had Congress said that payments for interest on borrowed money and payments for purchase of property should be allowed, the expression of these two items would have excluded all other items and would have left those with different kinds of claims without any remedy and with their rights determined against them by legislation.

Congress did the appropriate, wise, and just thing in giving the courts the jurisdiction to decide the rights of the parties affected by the Act of 1919 and definitely showed by the history of the legislation and by its extension of the rights of Respondent and others in like situation, that it believed that the legis-

lation passed in 1919 if properly construed and fairly administered would protect the rights of all parties. Believing this the committee said: "For the reasons above stated the committee has not thought it necessary to amend the original Act" (Appendix 26, 27).

Errors in Petitioner's Brief

Properly construing the record, we submit, fails to furnish factual support for some of the statements in Petitioner's brief herein. Petitioner says:

> "There is no indication in the record that the respondent proved that the property declined in value after purchase so that the respondent would suffer any loss as a result of the purchase." (Petitioner's brief, p. 8.)

The Secretary found "a loss on each property" (R. 5) including property loss of $16,259 (R. 6) which cost the same amount (R. 11).

The brief says "There was no indication that the property was entirely valueless" (Brief p. 9). The record found a loss of the total cost (R. 5, 6, 11).

The brief says:

> "* * * where the claimant retains title to the property purchased, the loss, if any, must necessarily be incapable of exact ascertainment." (Brief p. 16.)

If, as found and shown of record, the cost is found and the loss is found to be total, there is an "exact ascertainment" (R. 5, 6, 11).

The brief says:

"* * * it does not appear that any proof was offered by the respondent to show that it had *sustained any* loss." (Brief p. 20.)

But certainly the Secretary would not and did not find the loss without testimony (R. 5, 6, 11).

The Question of Law, Act 1919

However, stripped of verbiage and contradictions in the brief of Petitioner, Respondent's case is as stated, page 24 ante, and is one of statutory construction.

Petitioner's Argument from Statement of a Senator

One of the principal arguments of Petitioner, and the principal legal argument heretofore urged, is based upon the casual statement of Senator Smoot. That this is no legal basis for the conclusion sought by Respondent has already been demonstrated and further discussion thereof is unnecessary and Petitioner in his brief here has relegated to a note the reference to the casual remark of Senator Smoot.

No Acquiescence in Administrative Interpretation

It is also contended by Petitioner that the early determination by the Secretary that losses from real property purchased could not be considered shows a departmental regulation that should be persuasive if not conclusive. No such rule applies here. From the time Secretary Lane's Commission began to function the acts of the Department of the Interior in enforc-

ing the statute have been questioned by claimants, criticized by Congressional committees, reversed by some courts, and the Congress has enacted the amendatory and supplemental Acts of 1921, 1924 and 1929 for the purpose of changing the administrative action.

Only where the executive interpretation has been long continued, uniform and generally acquiesced in is it entitled to any consideration at all. Here, as said in *Merritt v. Cameron*, 137 *U. S.* 542:

> "*There is no such long and uninterrupted acquiescense in a regulation of a department, or departmental construction of a statute*, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to-wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons."

There has been no "acquiescence" and we submit that the statute is neither doubtful nor ambiguous. Indeed there has been a continued effort on the part of the Congress to aid claimants in overturning the construction of the Department of the Interior. (Appendix 26, 27, 31, 39, 56, 57.)

CONCLUSION

Respondent suffered a net loss as a result of purchasing property necessary in preparing to produce chrome. The amount of this loss and the good faith of Respondent have been found by the Secretary of the Interior. A remedial Act of Congress authorizes the

Secretary to adjust and pay this loss. The provisos contained in the Act and the subsequent amendments emphasize the fact that this loss falls within the scope of the legislation and we submit that the decision of the Court of Appeals of the District should be affirmed.

Respectfully submitted,

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